BOARD OF ALIEN LABOR CERTIFICATION APPEALS
800 K St., N.W.
WASHINGTON, D.C. 20001-8002

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Date: December 21, 1998
Case No: 98-INA-0156

In the Matter of:

ARTOON ARAKEL, M.D.
Employer

On Behalf of:

KNARIK DER BOGHOSIAN GHESHLAGHI
Alien

Appearance: Ara Aroustamian, Esq.
for the Employer and the Alien

Certifying Officer: Rebecca Marsh Day
San Francisco, California

Before: Holmes, Vittone and Wood
Administrative Law Judges

JOHN C. HOLMES
Administrative Law Judge

DECISION AND ORDER

This case arose from an application for labor certification on behalf of alien, Knarik Der Boghosian Gheshlaghi ("Alien") filed by Employer Artoon Arakel, M.D.. ("Employer") pursuant to 212(a)(5)(A) of the Immigration and Nationality Act, as amended, 8 U.S.C. 1182(a)(5)(A)(the "Act"), and the regulations promulgated thereunder, 20 CFR Part 756. The Certifying Officer ("CO") of the U.S. Department of Labor, San Francisco, California denied the application, and the Employer and Alien requested review pursuant to 20 CFR 656.26.

Under 212(a)(5) of the Act, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor may receive a visa if the Secretary of Labor ("Secretary") has determined and certified to the Secretary of State and to the Attorney General that (1) there are not sufficient workers who are able, willing, qualified and available at the time of the application and at the place where the alien is to perform such labor; and, (2) the employment of the alien will not adversely

affect the wages and working conditions of the U.S. workers similarly employed.

Employers desiring to employ an alien on a permanent basis must demonstrate that the requirements of 20 CFR, Part 656 have been met. These requirements include the responsibility of the Employer to recruit U.S. workers at the prevailing wage and under prevailing working conditions through the public employment service and by other means in order to make a good faith test of U.S. worker availability.

The following decision is based on the record upon which the CO denied certification and the Employer's request for review, as contained in an Appeal File ("AF"), and any written arguments of the parties.

STATEMENT OF THE CASE

On December 9, 1994, the Employer filed an amended application for labor certification to enable the Alien to fill the position of Medical Secretary/Administrator in its Medical office.

The duties of the job offered were described as follows:

"Responsible for general secretarial and administrative duties, such as, answering calls, giving appointments, maintaining patient files, billing patients and prepare insurance claim forms. Accept patients and assist them with filling in intake forms. Must be able to type and be knowledgeable in usage of computers."

A high school education and 2 years experience in the job was required. Special requirement was; must be fluent in the Armenian language. Wages were $1,992.00 per month. No employees would be supervised, and applicant would report to the Doctor.(AF-103-138)

On January 19, 1996, the CO issued a NOF denying certification. The CO alleged that employer may have violated 20 C.F.R. 656.21(b)(2)(i)(c)in that the requirement of a foreign language is unduly restrictive unless documented by business necessity. The CO required documentation by Employer that the job requirements of a foreign language bear a reasonable relationship to the occupation in the context of the Employer's business and is essential to perform in a reasonable manner, the job duties. "The employer's'previous justification is an assertion and as such is insufficient to show the need for the foreign language requirement. No documentation or independent confirmation was submitted to show the need for the foreign language (such as a letter from a leader in the Armenian community)". Alternatively, the application must be amended and the position readvertised. Additionally, U.S. applicant Rebecca G. Klepsa stated in a follow-up questionnaire that she was not contacted. She appeared qualified for the position. Employer must submit documentation of phone calls he alleged he had made to applicant Klepsa and document lack of qualification, if any, of this applicant.(AF-99-

101)

Employer, February 23, 1996, forwarded its rebuttal, stating that the language requirement was necessary in his business, since nearly all of his patients and his staff were of Armenian extraction and spoke only that language. Employer alleged his patients did not speak English well in most cases. “If the position is not filled by another qualified individual, who does not speak Armenian, the task cannot be fully performed unless the employee uses an interpreter.” Employer attached a letter from Karapetian & Associates on the issue of the Armenian population in Southern California.

With respect to contacting Ms. Klepsa, Employer reiterated its previous allegation that she had been contacted by phone (in Minnesota) but could not locate a phone bill. “The employer attempted to contact Ms. Klepsa after receiving the Notice of Findings and was told by her mother that she no longer lives at the provided address and that she now lives in Northern California. A message was left for her to call the employer. The purpose of the call was to speak with Ms. Klepsa and perhaps refresh her memory regarding the short conversation that included two questions. ‘Do you speak Armenian?’ and after Ms. Klepsa responded in the negative, ‘But why did you apply if you don’t?’, that received the following response, ‘I’m sorry, I was not aware of the language requirement.’” Ms. Klepsa’s mother reconfirmed the fact that Ms. Klepsa does not speak Armenian. Employer requested a 45 day extension if the telephone bills were necessary. On July 2, 1996, Employer stated it could not find the telephone bills or locate Ms.Klepsa, and requested that it be permitted to readvertise.(AF-82-98).

On August 28, 1996, the CO issued a Final Determination denying certification stating Employer did not establish that the requirement of the foreign language arises from business necessity. Rather Employer refused to give the list of client’s names since these are confidential. The CO, also, found Employer’s contentions with respect to Ms. Klepsa did not comply with the CO’s request which was documentation of telephone bills. An option to readvertise in lieu thereof was not given to Employer. “The employer has failed to provide convincing documentation to indicate recruitment was conducted in good faith.” (AF-80) The CO, also, rejected Employer’s arguments with respect to the qualifications of Ms. Klepsa.(AF-79-81)

On October 1, 1996, Employer filed a request for review and reconsideration of Final Determination. (AF-1-78)

DISCUSSION

Section 656.25(e) provides that the Employer's rebuttal evidence must rebut all the findings of the NOF, and that all

findings not rebutted shall be deemed admitted. Our Lady of Guadalupe School, 88-INA-313 (1989); Belha Corp., 88-INA-24 (1989)(en banc). Failure to address a deficiency noted in the NOF supports a denial of labor certification. Reliable Mortgage Consultants, 92-INA-321 (Aug. 4, 1993). On the other hand, where the Final Determination does not respond to Employer's arguments or evidence on rebuttal, the matters are deemed to be successfully rebutted and are not in issue before the Board. Barbara Harris, 88-INA-32 (April 5, 1989)

Section 656.21(b)(6) provides that Employers are required to make a good faith effort to recruit qualified U.S. workers for the job opportunity. H.C. LaMarche Ent., Inc. 87-INA-607 (1988).

Unduly restrictive requirements such as bilinguilism may have a chilling effect on the number of U.S. workers who may apply for the job opportunity. Venture International associates, Ltd. 87-INA-569(1989)(en banc); Frank Basilica, 95-INA-283 (Feb. 6, 1997). In order to show business necessity the employer must show:(1) that the requirement bears a reasonable relationship to the occupation in the context of the employer's business; and (2) that the requirement is essential to performing, in a reasonable manner, the job duties as described by the employer. Information Industries, Inc., 88-INA-82 (Feb. 9, 1990)(en banc). It is a long-held principle that new evidence may not be submitted on appeal to this Board. Gnaw Auto Sales & Parts, 91-INA-352 (Dec. 16, 1992).

Employer forwarded a study of the Armenian community in Southern California, in which *inter alia* it finds a population of 200,000 Americans of Armenian extraction, many recent immigrants who speak very little English. The CO in her Final Determination did not address whether or not this study adequately documented the issue of business necessity for a foreign language, but rather addressed Employer's refusal to release its lists of patients, nor did she determine whether or not this refusal was reasonable. Since the CO did not directly respond to Employer's contention, whereas the Employer may not have directly responded to the CO's request for documentation of language requirement in his business as opposed to the community at large, we believe the best course is remand despite the long period of time this application has already taken for processing. In that connection we, also, note that the study submitted by Employer to document business necessity, indicates there are 14 Armenian language newspapers published in Los Angeles (as well as 20 hours TV broadcast time). It would appear that, on remand, a proper approach to obtaining qualified U.S. applicants, assuming fluency in the Armenian language is documented as a business necessity, would be to advertise in one of these newspapers in addition to one of general circulation.

With respect to Ms. Klepsa's application, we agree with Employer that he has expended reasonable efforts to determine that this U.S. applicant is not fluent in Armenian. M & G

Waterproofing, Inc. 96-INA-428 (Jan. 27, 1998); Yedico International, Inc., 87-INA-740(Sep. 30, 1988)(en banc). Employer's other argument, basically, that Ms. Klepsa is overqualified, is a position this Board has consistently rejected. Pavelic v. Levites, P.C., 92-INA- 413 (May 31, 1994) The validity of her application, therefore, depends upon whether or not the requirement of fluency in Armenian is documented and found as a legitimate business necessity.

ORDER

The Certifying Officer's denial of labor certification is VACATED, and the matter remanded for appropriate action by the Certifying Officer.

For the Panel:

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JOHN C. HOLMES
Administrative Law Judge